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No. 82-234

IN THE

Supreme Court of the United States

October Term, 1982

AUDREY M. LEE, *et al.*

Petitioner(s)

v.

SHIELD PETROLEUM CORPORATION,
VIKING RESOURCES CORPORATION, *et al.*

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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QUESTIONS PRESENTED

I. WHETHER A DISTRICT COURT JUDGE MAY, UNDER RULE 23 (1), FEDERAL RULES OF CIVIL PROCEDURE, DECERTIFY A SECURITIES FRAUD CLASS ACTION CASE *AFTER* A TRIAL HAS CONCLUDED ON THE MERITS?

II. IN A CLASS ACTION SECURITIES FRAUD CASE, WHERE THE DEFENSE OF STATUTE OF LIMITATIONS HAS BEEN RAISED, DOES THE DENIAL OF A TIMELY MOTION TO INTERVENE, AS A MATTER OF RIGHT, CONSTITUTE REVERSIBLE ERROR?

III. WHETHER CERTIFIED COPIES OF FILES MAINTAINED BY THE SECURITIES AND EXCHANGE COMMISSION, AS TO THEIR INVESTIGATIVE FINDINGS, MAY BE INTRODUCED IN EVIDENCE IN SUPPORT OF CLAIMS ALLEGING FRAUD UNDER SECTION 10(b) OF THE EXCHANGE ACT OF 1934 AND UNDER RULE X-10b-5 OF THE RULES AND REGULATIONS PROMULGATED THEREUNDER?

IV. WHETHER THE SALE OF SECURITIES BY A NON-REGISTERED BROKER-DEALER RAISES A CONCLUSIVE PRESUMPTION OF FRAUD UNDER SECTION 10(b) OF THE EXCHANGE ACT OF 1934?

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SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION, *et al.*

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Audrey M. Lee, et al., petition this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Petitioner filed a Complaint, asserting class action violations, of Sections 17(a) of the Securities Act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder. Petitioner sought money damages and recission on behalf of herself and two classes of investors namely (a) those investors who invested in oil and gas drilling ventures sold by Shield Petroleum Corporation and (b) limited partnership interests in other oil and gas drilling ventures, sold by Viking Resources. One of the Defendants named

in the Complaint, James C. Eigel, controlled Shield Petroleum Corporation and Viking Resources through a myriad of corporate identities.

ORDERS AND OPINIONS

On July 12, 1977, the District Court granted the Petitioner's Motion allowing the action to proceed as a class action. Notice of Class Action was duly published. *Appendix A.*

The cause proceeded to Trial before the Court, as a class action on July 3, 5, 6, and 7, 1978. On September 13, 1978, the District Court entered a Judgment dismissing the Complaint. *Appendix B.* The Court made Findings of Fact, entered an Opinion and entered Conclusions of Law. *Appendix C.*

Petitioners filed a Motion for Reconsideration and to Vacate Judgment. The Court denied that Motion. *Appendix D.*

Petitioner filed a Motion su supplant the trial record by submittal of Certified Copies of the S.E.C. files. On September 13, 1978, the Court denied the Motion as moot in light of the Court's Statute of Limitations ruling which defeated the Petitioner's claims. *Appendix E.*

Petitioner noted an Appeal from the Trial Court's Orders and Judgments. The cause came on to be heard before the United States Court of Appeals for the Sixth Circuit. On March 23, 1982, the Sixth Circuit Court of Appeals affirmed the District Court's Judgment and Orders. *Appendix F.*

On April 22, 1982, the Court of Appeals entered an Order ruling that the mandate in the above entitled Appeal was "improvidently issued". *Appendix G.*

Petitioner filed a Petition for Rehearing and Petition for Rehearing en banc. On June 11, 1982, the Court of Appeals denied the Petition for Rehearing. *Appendix H.*

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

FEDERAL STATUTES INVOLVED

Section 17(a), Securities Act of 1933, 15 U.S.C. 77q(a).

Section 10(b), Securities Exchange Act of 1934, 15 U.S.C. 78j(b).

Section 15(a)(1), Securities Exchange Act 1934, 15 U.S.C.

FEDERAL REGULATIONS INVOLVED

17 C.F.R. 200.80 (b) (5), Section 552 (b) (5).

FEDERAL RULES INVOLVED

Rule 23, (c) (1), Federal Rules of Civil Procedure. (Class Actions).

STATE STATUTES INVOLVED

Section 2305.09 (c), Ohio Revised Statute.

STATEMENT OF THE CASE

The Petitioner, Audrey Lee, brought an action in the United States District Court for the Southern District of Ohio, Western Division, seeking damages against the Respondents due to violations of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), Rules 10b-5 of the Securities and Exchange Commissions Rule promulgated thereunder. Petitioner also sought damages due to common law fraud and further sought Accounting.

The Respondents consist of (a) Shield Petroleum Corporation, (b) Viking Resources Corporation and (c) James E. Eigel, who controlled and owned Shield and Viking via another cor-

poration, not a party to these proceedings, named Nordic Oil Corporation. The litigation also involved certain conduct engaged in by James C. Eigel, acting through Viking Resources Corporation, which promoted oil and gas programs called Viking Oil and Gas Program 1970, 1971 and 1972. The litigation also involved certain conduct engaged in by James C. Eigel via his oil and gas partnership ventures after 1972. Petitioner did not invest in the Viking Oil and Gas Programs nor did she invest in the Partnership Ventures solicited by the Respondents after 1972 Her investments were restricted to investments before 1972. Her investments were restricted to investments in the Knight Numbers 1 and 2 wells, the Laura Kidd Numbers 3 and 4 wells, and the C. Burke three (3) well program.

Petitioner sought Certification of the action as a Class Action. On July 12, 1977, the Trial Court determined that the Action could proceed as a Class Action.

Notably, Respondents had pleaded, as an affirmative defense, the Statute of Limitations. After extensive discovery, the cause proceeded to Trial before the Court, sitting without a Jury, on July 3, 1978.

In June, 1978, approximately several weeks prior to actual Trial, a Motion to Intervene was filed on behalf of Robert Levine and William Milleck, both investors in the Viking 1970, 1971 and 1972 Oil and Gas Programs. During the Trial on the merits, Petitioner requested a ruling by the Trial Court on the Motion to Intervene. The Trial Court refused to rule on the Motion, however. At the conclusion of the Trial, Petitioner made an oral motion for leave to supplement the Trial Record with a certified copy of the Securities and Exchange Commission's Investigatory File pertaining to Shield Petroleum, James C. Eigel, and Viking Resources Corporation. The Court granted the Motion to the extent that only the conclusions found by the Securities and Exchange Commission would be admitted and not the Commission's entire Investigatory files. Whereupon, the Trial was concluded on July 7, 1978.

Petitioner filed a post trial Motion for Submittal of Evidence

which included the entire certified investigatory file compiled by the Securities and Exchange Commission.

On September 13, 1978, the Trial Court ruled that in light of the Judgment and Order entered on the merits, the Motion was denied as moot.

On September 13, 1978, the Trial Court entered it's Findings of Fact, Opinion and Conclusions of Law. Whereupon, the Trial Court entered a Judgment dismissing the Petitioner's Complaint upon the ground that the claims were barred by the Statute of Limitations, and further decertifying the Class Action upon the ground that since the Petitioner's claims were barred by the Statute of Limitations, her claims were not typical of a class of claimants whose similar claims may not be so time barred.

Petitioner thereafter filed a Motion for Reconsideration and to Vacate Judgment and Order. On January 3. 1979, the Trial Court entered an Order denying the Motion.

An Appeal was filed to the Sixth Circuit Court of Appeals. On September 13, 1978, the Sixth Circuit Couirt of Appeals affirmed the Trial Court's Judgment and Order. *Appendix C.* Subsequently, post trial motions were denied, including an error in a Mandate Order which the Court declared had been "improvidently granted". *Appendix D, E, F, G & H.*

STATEMENT OF THE FACTS

1. For a period beginning in 1965, Respondent James C. Eigel was engaged in the business of selling to investors fractional shares in proposed oil and gas wells. From 1965 to approximately 1972 he operated under the corporate name of Shield Petroleum Corporation, an Ohio Corporation. Subsequent to 1972 he operated under the name of Viking Resources, a wholly owned subsidiary of Shield Petroleum Corporation. At no time was James C. Eigel, Shield Petroleum or Viking Resources registered as a broker/dealer with the Securities Exchange Commission.

2. During a period from December, 1969, through December, 1971, Petitioner Audrey Lee invested $5,471.88 with Shield Petroleum Corporation. She never invested with Viking Resources. Her investment purchased a 1/64th interest in each of four wells identified as Laura Kidd No. 3, Laura Kidd No. 4, C. Burke Morris, and Knight No. 1. Plaintiff also purchased a 3/64th interest in a well identified as Knight No. 2.

3. Consolidated Gas Company of West Virginia owns mineral rights in large areas of the State of West Virginia. These rights grant to Consolidated Gas Corporation the right to drill for oil and gas subject to the payment to the owner of the fee simple title of 1/8 of all amount received from sale of the oil or gas. Consolidated Gas Corporation will grant to third persons what is in effect a sublease upon terms and conditions negotiated between them. Such subleases are known as "farm-out agreements" and will be referred to as such hereafter.

Shield Petroleum Corporation negotiated farmout agreements with Consolidated Gas Corporation for each of the five wells in question. Shield was required to pay as consideration therefor a 1/8th royalty, known as an "override" to Consolidated Gas and was required to sell to Consolidated at a specified price all gas or oil recovered.

4. It was the procedure of Shield Petroleum Corporation to sell interests in each well in 1/64th denominations. The sales of such interests set forth a specific sum for 1/64th for drilling the well and an additional sum for completion costs.

The cost of a well is divided into two segments. First, the cost of drilling a hole to a specific agreed upon depth; and second, to place casing therein, seal the casing with cement, perform an operation known as "hydro-fracing" and attach the well to either a gas or oil pipeline. This division of costs enables the well driller to decide whether or not to complete the well after the agreed depth has been reached. Contracts providing a fixed cost for drilling and for completion are known as "turn key" contracts as distinguished from a contract providing a cost per foot of drilling and completion. All contracts referred to herein were of the turn key variety.

5. Details as to each of the wells in question are as follows:

A. The "C. Burke Morris Well" was actually a three-well program located in Gilmer County, West Virginia. Drilling rights were acquired by Shield from Consolidated Gas Corporation in a farm-out agreement dated June 30, 1969. Interests in the three-well program were sold at $1050.00 for a 1/64th interest in the three wells from drilling and $395.00 for a 1/64th interest in the completion of each individual well. Drilling for Morris Well No. 1 commenced on July 20, 1970, and reached a depth of 1970 feet. Drilling for Morris Well No. 2 commenced on August 14, 1970 and reached a depth of 2,000 feet. Drilling for Morris Well No. 3 commenced on October 9, 1970 and reached a depth of 2071 feet. All three wells were completed and remained in production until April of 1974 when the wells were sold to the Polumbus Corporation. Shield Petroleum Corporation had retained 18/64ths in these wells.

B. The "Knight No. 1 Well" was located in Calhoun County, West Virginia. Drilling rights were acquired by Shield from W.T. Parks in a farm-out agreement dated June 19, 1970. Interests in this well were sold at $150.00 for a 1/64th interest for drilling to the casing points and $375.00 for a 1/64th interest in the completion of the well. Drilling for Knight No. 1 commenced on July 20, 1970, and reached a depth of 2035 feet. This well was completed and remained in production until April of 1974 when it was sold to the Polumbus Corporation. Shield Petroleum retained 33/64th in this well.

C. The "Knight No. 2 Well" was also located in Calhoun County, West Virginia. Drilling rights were acquired by Shield from W.T. Parks in the June 19, 1970 farm-out agreement. A 1/64th interest for drilling to the casing point sold for $150.00 and the cost of completion for a 1/64th interest was $375.00. Drilling for Knight No. 2 commenced on August 18, 1970, and reached a depth of 2066 feet. This well remained in production until April of 1974 when it was sold in

the transaction with Polumbus Corporation. Shield Petroleum Corporation retained a 41/64th interest in this well.

D. The "Laura Kidd No. 3 Well" was located in Gilmer County, West Virginia. Drilling rights were acquired by Shield from Consolidated Gas Corporation in a farm-out agreement dated May 15, 1969. A 1/64th interest was $375.00. Drilling commenced on January 26, 1970, and reached a depth of 1736 feet. This well was plugged and abandoned on February 27, 1970. Shield Petroleum Corporation retained a 17/64th interests in this well.

E. The "Laura Kidd No. 4 Well" is also located in Gilmer County, West Virginia. Drilling rights for this well were also acquired from Consolidated Gas Corporation in a farm-out agreement dated May 15, 1969. A 1/64th interest from drilling to the casing point sold for $350.00 and the cost of drilling to completion was $390.00 for each 1/64th interest. This well included in the transaction with the Polumbus Corporation in April of 1974. Shield Petroleum Corporation retained a 38/64th interests in the Well.

The evidence disclosed, uncontrovertedly, that the Respondents acted as Broker-Dealer and as such, failed to register with the Securities and Exchange Commission as to a Number of the Securities offered to the public.

In 1970, Viking offered its 1970 oil and gas programs to the public but failed to Register with the S.E.C. as Broker-Dealer. In 1971, Viking offered its 1971 Oil and Gas Programs to the public but failed to Register with the S.E.C. as Broker-Dealer.

Among the questionable practices by Respondent, Eigel consisted of withdrawing sums of money, for example, $100,000 from the Shield Petroleum account payable to Nordic Oil Corporation as a Divident. Respondent Eigel admitted that he was 100% owner of Nordic Oil Corporation.

In a series of inter-locking corporate acts, Shield paid rent to

Viking from the Shield Royalty Account. After various Shield Programs were closed, unused leases were assigned over to Viking.

As a matter of fact Shield had already drilled on some of the leases which it had assigned to Viking. Yet Viking represented facts, regarding acquisition of those leases, in a different light to its investors. In the 1970 Viking oil and gas program prospectus, Viking represented that geographical areas had not then been determined (for drilling) when in truth and in fact, some of those areas had been determined such as the C. Burke Morris lease in West Virginia. Throughout the life of Shield and Viking, funds were diverted from Shield Bank Accounts and transferred to Viking Partnership. In another transaction, which was unknown to Viking Investors, $650,000 was paid into the Viking Bank Account but was subsequently transferred to the Shield Regular Checking Account as part of the arrangement between Shield and Viking. Under the Viking programs, Shield acted as Drilling Operator, charged Viking funds for those "services" and then sub-let or entered into contracts with other independent drillers. On July 11, 1972, Viking paid Shield the sum of $5,300 in "just an inter-company transaction." At no time did Shield or Viking put "risk venture capital" in any of the Shield or Viking Programs other than in programs in which 48th/64 interests had not been sold. Shield extracted substantial sums of money from the Shield Royalty Account at the expense of the investors who received nominal sums. In February, 1974, Shield opened and maintained a checking account labelled "Shield Petroleum, Coopers and Lybrand", the latter being certified Public Accountants of Shield. In February, 1974, that account was opened with a deposit of $513,671.47. In the same month, the amount of $505,630.56 was withdrawn from the account. In March, 1974, $506,027.57 was deposited to the account and $532,580.55 was withdrawn from the Cal-Viking Partnership. The original $500,000 in a Certificate of Deposit was renewed in smaller amounts, during the month of February and March. 1974 to cover the cost of drilling twelve gas wells. In other transactions between Viking and Shield, inter-company loans were made but this fact, as all others, was not stated in any communication to investors by neither Shield nor Viking.

In 1972, *Respondents* Eigel became a member of the National Association of Securities-Dealers, but resigned in 1975. *Respondents* Eigel was asked the reason for his resignation at which time opposing counsel objected. The Court sustained the objection. Nor did the *Respondents* Register as Broker-Dealer with the S.E.C. until 1972. Nonetheless, from 1969 (under the Shield programs) to 1972 (under the Viking Oil and Gas Programs), oil and gas securities were sold to the *Respondents* in interstate commerce, without compliance of Registration by Eigel, Shield and Viking.

In 1970, 1971 and 1972, Viking established a "Custodian" rather than an "Escrow" Account with the National Bank of North America. The Custodian Account authorized Viking and Eigel to direct the Bank to pay such amounts as was requested by Viking and Eigel.

THE VIKING OIL AND GAS PROGRAMS

1. Viking, organized with funds derived from the Shield Joint venture, had as its sole purpose of extracting illegally, funds from the same investors who had initially invested in Shield and had lost all of their investments.

2. Eigel is the principal officer and director of Viking as well as its majority shoreholder, is President, Chief Operating Officer and Chairman of the Board of Shield and Viking respectively; owns approximately 70% of shares or interest in Shield and Viking.

3. Shield and Viking offered and sold interests to the public in various joint ventures and limited partnerships or through shares of stick with them as agents. Purpose of ventures purportedly to finance the acquisition, testing, development and operation of oil and gas leaseholds.

4. Respondents through the offer, purchase and sale of interests in oil and gas programs, obtained money and property using false statements of material facts and omissions to state material facts necessary to avoid misleading statements, also devices, schemes and artifices to defraud; and engaged in tran-

sactions, acts, practices and courses of business which operate as a fraud and deceit upon the investors.

5. 1969-1976 Respondents entered into program agreements with public investors whereby they as the agents for the investors were given certain duties and obligations; these were set forth in Shield and Viking prospectuses and were part of SEC registration statements, the public received these agreements and prospectuses.

6. These drilling programs were a series of "Non-Producing Working Interests" or limited partnerships, with Shield and Viking as the general partner and the particular as the limited partners.

7. Respondents have made further developmental calls to investors to raise dollars to develop already owned leasehold interests and to buy and develop acreage off-setting initial exploratory drilling; over several million dollars have been raised this way.

8. Public information and documents inadequately described the misuse, diversion and/or misappropriation by Respondents and others as dollars invested by and assets belonging to participants.

9. Such documents failed to disclose the misuse of drilling programs' gas reserve by certain Respondents and others for their personal benefit.

10. Such documents failed to disclose the manner and timing of leasehold acquisitions.

12. Such documents failed to disclose Respondents' skimming off of various oil and gas leasehold interests.

13. Such documents failed to disclose amounts paid as commissions for the sale of drilling program interests to the public.

14. Such documents failed to disclose Respondents' failure to maintain the promised Central Trust Bank Escrow Account as stated in Schedule D.

15. Such documents failed to disclose Eigel's withdrawal of funds from the Escrow Account for his personal use.

16. Such documents failed to disclose Respondents' use of said funds for Shopping Center construction, pleasure trips, other stock purchases, etc. rather than solely for drilling.

17. Such documents failed to disclose the transfer of Shield funds to Viking Resources Treasury set up by Eigel to finance Viking projects.

18. Such documents failed to disclose the numerous interests reserved for Eigel's immediate family.

19. Such documents failed to disclose Respondents' disbursement of only minimal fractional royalty payments, not the royalty payments equal to each investor's interest.

20. Such documents failed to disclose Respondents' manipulation of figures for royalty payments, using a calculation whereby each investor was paid royalties substantially less than the interest purchased by payment of drilling and completion costs.

21. Such documents failed to disclose Respondents' failure to pay West Virginia sales tax although they charged investor therefor.

22. Such documents failed to disclose Respondents' awareness that the wells were mostly minimally productive; "bad wells" or potentially dry wells, while, at the save time, demanding investors to pay the completion costs for these wells.

23. Such documents failed to disclose that promises made to SEC and to investors concerning each well's potential production capability were not based on technical geological data, as no professional geologist was ever engaged by Respondents to determine such prior to selling interests in these wells.

24. Respondents placed into such drilling programs some wells known to be drilled and abandoned before the program was even formed.,

25. Eigel, acting by and through Shield and Viking, with others, skimmed off valuable free carried working interests in drilling prospects, without disclosing such to investors.

26. After several drilling program offerings had begun, Shield allocated development calls payments in a previously offered drilling program to its then current offering without making such disclosure.

27. Nearly all Eigel's revenues and assets have been derived from transactions with Shield Nearly all Viking's revenues and assets have been derived from transactions with Shield and Eigel. These funds have been and are being used for Respondents' personal use and benefit, however, they rightfully and legally belong to the investors in the form of either royalty payments, completion cost of other.

28. As a result of Shield's merger into Viking, completed in 1974, Eigel solidified his ownership and control of Viking. Through this means Eigel diverted money from public drilling program and defrauded the investors of large sums of money.

29. Although documents stated that participants would be charged for only those expenses necessarily incurred in connection with the drilling programs, they were in fact charged for many of Respondents' unrelated expenses.

30. Among Respondents' personal and other expenses charged to the drilling programs were private home, automobiles clothing, liquor, vacation and trips by Eigel's friends and relatives, stock purchases in various Eigel corporations, purchases of interests in shopping centers and other business ventures.

31. Eigel with and by use of Shield and Viking, participated in this scheme, using the companies as conduits through which investors' monies were diverted to Respondents and other's personal use.

32. From 1969-1974 substantial sums were diverted from the drilling program accounts into Shield's bank accounts and then most of this money went to relatives of and companies controlled by Eigel, along with others.

33. In or around 1974, Eigel caused Shield to merge with Viking in futherance of the scheme to misappropriate investors' monies which had been and were being diverted into Viking under Eigel's control.

34. The custodian accounts were, in fact, shams; Eigel did not comply with the custodian agreements requirements, thus depriving participants of protection purportedly afforded by said agreements; public offering proceeds were transferred to Eigel's personal Central Trust Account and then withdrawn therefrom, rather than disbursed pursuant to vouchers for expenditures as was represented to investors; the disbursement of monies by Viking and by Shield directly to Eigel facilitated this misappropriation, commingling and misuse of investors' monies.

35. Registration Statement and other documents represented the segregation and maintenance of separate custodian accounts for proceeds from the sale of various drilling funds and that defendants would perform other custodial services when, in fact, the proceeds went into Eigel's accounts.

36. Registration Statements and other documents represented that only expenses necessary to the operations of the drilling programs would be charged to participants, when in fact, defendants' and other's personal expenses were charged to the public drilling program.

37. James C. Eigel and Shield Petroleum Corporation illegally used funds from Shield's Regular Account and Shield's Royalty Account to finance Viking Resources Corporation.

38. All gas wells in Shield and Viking Programs were sold without investors' consent contrary to written representation made by Shield and Viking and Eigel

39. Shield and Viking relied on old Geology Reports and failed to obtain updated geology reports when they knew that the leases had been "conditional" as to title, under Farm-out Agreements which Shield and Viking failed to make full disclosures.

SUMMARY OF ARGUMENT

I. A Trial Court may not decertify a class action, previously certified, after a Hearing on the Merits upon the ground that the representative plaintiff was not "typical" in light of statute of limitations questions. The presence of individual questions of Statute of Limitations does not prevent certifications nor dies it establish a basis for decertification of class actions in securities cases.

II. The Trial Court erred in denying a Motion to Intervene as a matter of right, made by an investor who claimed an interest relating to the transactions which was the subject matter of the pending action where the Motion was timely made, depositions had been taken and such intervention would not have prejudiced the Defendant/Respondents nor impeded the course of the litigation.

III. The Trial Court erred in denying Petitioner's Motion to Supplant the Trial Record by filing certified copy of the Securities and Exchange Commission's Investigatory file relating to the results of an investigation into Shield and Viking's practices in selling securities.

IV. The sale of Securities by a Broker-Dealer who has failed to register with the Securities and Exchange Commission raises a conclusive presumption of Fraud as to all investors under Section 10(b) of the Exchange Act of 1934 and in violation of Section 15(a) (1), of the Exchange Act of 1934.

REASONS FOR GRANTING THE WRIT

Petitioner(s) contend that the Petition for Writ of Certiorari should be granted for the stated reasons as follows: (a) The Sixth Circuit Court of Appeals has rendered a decision in the above cause which is in conflict with the decisions of other Courts of Appeal involving similar issues, (b) the Sixth Circuit Court of Appeals has decided a federal question involving the Securities Laws of the United States in such a way as to conflict with prior decisions of this Court, and (c) the Sixth Circuit Court of Appeals has so far departed from the accepted and

usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. The foregoing reasons are more fully supported by a discussion of the case law demonstrating the conflicts of laws and the departure from previous decisions emanating out of this Court and which conflict with the decisions emanating out of other Circuit Courts of Appeals.

I

A DISTRICT COURT MAY NOT DECERTIFY A CLASS ACTION SECURITIES FRAUD CASE AFTER A TRIAL ON THE MERITS HAS CONCLUDED UNDER RULE 23(c)(1), FEDERAL RULES OF CIVIL PROCEDURE.

On July 12, 1977, the District Court for the Southern District of Ohio, Western Division, entered an Order allowing Petitioner's Class Action Securities Fraud Complaint to proceed as a Class Action. On September 13, 1978, the District Court Decertified the action as a class action *after* a trial had concluded. (*Appendix C*).

Rule 23(c)(1), Federal Rules of Civil Procedure provide as follows:

> "(1) As soon as practicable after the commencement of an action brought as a class action, the Court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and *may be altered or amended before the decision on the merits.*" (Emphasis supplied).

The issue then, is whether or not a Federal District Court may decertify a class action after a trial has been held on the merits? Prior cases discussing *Rule 23 (c) (1)* are directly targeted to the overall supervisory power of a Federal Judge in Class Action Litigation. But that supervisory power does not vest the Court with all power which is unquestioned or gauged against standards of sound discretion as opposed to abuse of discretion. To be sure, *Rule 23 (c) (1)* discreetly grants the power before a Trial

on the merits and not after a trial has been held on the merits. As a general rule, an order entered by a District Court decertifying a class action may be reversed only for an abuse of discretion. *Paton v. La Prade, 524 F. 2d 862, 875, (3rd Cir., cert. den., 421 U.S. 1011, 95 S. Ct. 2415 (1975).* Those cases establish a standard for Federal Courts "before the decision on the merits" and not *after* (emphasis supplied) a trial has been held on the merits. In a speech before the Judicial Conference, Judge Frankel (U.S. District Court, Southern District of New York) cautioned District Courts against reliance upon their broad powers to "alter or amend" certification of a class action under *Rule 23 (c) (1), F.R.Civ. P.* Judge Frankel had this to say:

> "My suggestion is that we should avoid finding too much comfort in this assurance that there will be time to correct mistakes. For example, to revert to the annoying question of statute of limitations, what happens if a Court upholds a class action under (c) (1), then chages its view at a later date when the statute has run?

In the pending case, although the Court was aware that extensive discovery had been conducted and there was indeed time within which a Motion to Decertify the class actoin could have been filed, a Motion to that effect was not filed, nor did the Court entertain such a Motion sua sponte which It certainly had the power to do. Notedly, the Trial Court in it's Conclusions of Law concluded as follows:

> "B. Where a plaintiff's claims are barred by statutes of limitations such plaintiff is not typical of a class of claimants whose similar claims may not be so time barred and such plaintiff may not act as a representative in a class action." (*Appendix c*).

The Court's conclusion was incorrect. Moreover, the Sixth Circuit Court of Appeals did not even address that issue in it's decision even though Counsel had briefed the point. (*Appendix F*).

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[1]Frankel, Marvin E., Judge, U.S. District Court for Southern District of New York, *Some Preliminary Observations Concerning Civil Rule 23, (1967), 43 F.R.D., 42.*

To be sure, there was no question as to the interlocutory effect of the decertification order since that order was included in a final judgment. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974); Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541 (1949).* Even under the finality doctrine, the Sixth Circuit Court of Appeals ignored a critical issue. Inherent in the decertification issue was the issue of the statute of limitations. (*Appendix C*). Ignoring the issue or, in the very least, an erroneous ruling on that issue poses sufficient reasons for this Court to grant certiorari. In class action cases, where the representative plaintiff may collide into a statute of limitations defense, the law is well settled that given a sufficient nucleus of common questions, the presence of the individual issue of compliance with the statute of limitations does not prevent certification of a class action in securities fraud cases. *Umbriac v. American Snacks, Inc. 388 F. Supp. 265, 272 (E.D. Pa. 1975); Cohen v. District of Columbia National Bank, 59 F.R.D. 84, 90 (D.D.C., 1972); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y., 1968).* Conversely, individual issue of compliance with the statute of limitations is not sufficient grounds nor reasons for decertification of a class action *after* a trial has been had on the merits. *Rule 23(c) (1), F.R. Civ. P.* In yet another decision, on point, the Ninth Circuit Court of Appeals held that the presence of individual Issues of compliance with the statute of limitations did not defeat the predominance of common questions. *Cameron v. Adams & Company, etc. 547 F. 2d 473 (9th Cir., 1975).* What the District Court effected in it's decertification order and the Sixth Circuit Court of Appeals compounding of that erroneous Order spelled the Death-Knell of the Class Action. *Cohen v. Beneficial Industrial Loan Corp., supra; Eisen v. Carlisle & Jacquelin, supra; Parkinson v. April Industries, Inc. 520 F. 2d 650 (2nd Cir., 1975); cf. Weight Watchers of Philadelphia, Inc. v. Weight Watchers International Inc., 455 F. 2d 770, 773 (2nd Cir., 1972).*

II

IN CLASS ACTION LITIGATION, THE DENIAL OF A MOTION TO INTERVENE AS A MATTER OR RIGHT CONSTITUTES REVERSIBLE ERROR.

The magnitude of lower court errors in denying the Motion for Intervention as a matter of right is grounded upon the Court's final judgment, decertifying the class because it felt that since a statute of limitations problem existed as to the representative plaintiff, she could not possibly represent the class. Conversely, had the Motion been granted, the class of representative plaintiffs would have been expanded to two or three persons whose claims were not barred by the statute of limitations.

Under *Rule 24(a), Federal Rules of Civil Procedure* it is provided as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervent in an action: (1) when a statute of the United States confers an unconditional right to intervent; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The District Court's denial of the Motion to intervene as a matter of right and the Sixth Circuit's side-stepping of that issue constituted a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Where a party seeking intervention has an interest relating to the subject matter, property or transaction, intervention, as of right, is liberally granted. The decisions of this Court so hold. *Cascade Natural Gas v. El Paso Natural Gas, 386 U.S. 129, 87 S. Ct. 932 (1967); Trbovich v. United Mine Workers of America, 404 U.S. 528, 92 S. Ct. 630 (1972); Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S. Ct. 666 (1941).* Adequacy of representation requirement under *Rule 24(a)* must be read conjunctively with the re-

quirements of *Rule 23* which provides for class action certification pending sufficient compliance with the standards set inorder to determine certification. A denial of the Motion to Intervent as a matter of right was contrary to decisions by the same Circuit (Sixth). See *Marshall v. Local 299, Intern. Broth. Teamsters, etc. 617 F. 2d 154 (6th Cir., 1980); Kyles v. First Tennessee Bank 634 F. 2d 349 (6th Cir., 1980).* Timeliness of the Motion was not decisive since the deposition of the proposed intervenor had been taken prior to trial. *Nat. Association for Advancement of Colored People v. New York, 413 U.S. 345, 93 S. Ct. 2591 (1973).* Indeed, in denying the Motion to Intervene as a matter of Right under *Rule 24(a),* the Court's action constituted a conclusion of law rather than the exercise of it's discretion ordained under *Rule 24(b)* which did not come into play in any event.

III

CERTIFIED COPIES OF INVESTIGATIVE FILES OF THE SECURITIES AND EXCHANGE COMMISSION REPRESENTS SUBSTANTIAL PROOF OF FRAUD UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE COMMISSION'S RULES AND REGULATIONS PROMULGATED THEREUNDER 17 C.F.R. 200.80 (b) (5).

The Trial Court granted leave to supplant the Trial Record with certified copies of the S.E.C.'s investigatory files. Seemingly, the entire spectrum of District Court and Appellant Court error was grounded upon the Court's belief that since the representative Plaintiff did not invest in the Viking Resources Programs, she could not adequately represent the Viking investors. That conclusion was likewise repugnant to this Court's decision in *Eisen v. Carlisle & Jacquelin, supra,* which addressed itself to the question of division of classes into subclasses and sub-sub-classes in order to preserve judicial economy.

The Courts in other Circuits have long since held that disclosure of vital information contained in the Commission's

investigatory files are relevant and indeed impactive. See *Frankel v. S.E.C. 460 F. 2d 813 (2nd Cir., 1972), cert. den. 409 U.S. 889.* Moreover, records created by agencies of government and which are produced are inadmissible in evidence against relevant defendants. *In re Plumbing Fixtures, 311 F. Supp. 349, 350 (W.D. Okla. 1970); State of West Virginia v. Chas. Pfizer & Co., Inc. 314 F. Supp. 710 (S.D.N.Y., 1970), affirmed, 440 F. 2d 1079 (2nd Cir.) cert. den. 404 U.S. 871.* These files contained clear omissions and admissions of liability as well as admissions of Securities Act violations by the Respondents.

IV

THE SALE OF SECURITIES BY A NON-REGISTERED BROKER-DEALER RAISES A CONCLUSIVE PRESUMPTION OF FRAUD UNDER SECTION 10 (b) AND SECTION 15 OF THE SECURITIES EXCHANGE ACT OF 1934.

The District Court found that the Respondents, James C. Eigel, Shield Petroleum Corporation, and Viking Resources had failed to register with the Securities and Exchange Commission as a Broker/Dealer. (*Appendix C*). The District Court also ruled that the absence of proper registration by Respondents did not amount to a claim of fraud. (*Appendix C*).

Factually, the Respondent, Shield Petroleum Corporation, between 1969 and 1970, offered, in interstate commerce, fractional oil and gas investment contracts. These contracts were known as "turnkey contracts". In 1969-70, Shield sold various interests to the investing public in the following programs: Knight #1 Well, Knight #2 Well, C. Burke Morris (three well program), Kidd #3 Well, and Kidd #4 Well. In 1970, Viking Resources Corporation was organized by Respondent Eigel. During that Year, Viking sold Units in it's 1970 Oil and Gas Drilling Program. In 1971 and 1972, Viking changed it's offer from the sale of Units to a public offering of Limited Partnership interests in various Oil and Gas Partnership Ventures known as (a) Cal-Viking Partnership, (b) Spurrier-Eibel Partnership, (c) The Viking-Wilt Partnership (d) The Viking-

McAtee Partnership, and (e) the Salem-Viking Partnership. With the exception of the 1972 Oil and Gas Program, neither Shield nor Viking had registered with the Securities and Exchange Commission as a Broker/Dealer prior to making those Public Offerings.

Section 15 (a) (1) of the Exchange Act of 1934 provides as follows:

> "No broker or dealer . . . . shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section."

Section 3(a) (4) of the Exchange Act defines a Broker as follows:

> "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank."

Section 3(a) (5) of the Exchange Act defines a Dealer as follows:

> "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise."

The issue raised then, is whether a Broker-Dealer who fails to Register as such with the Securities and Exchange Commission and who, during the period of non-registration, sells securities, is guilty of violation of Section 15(a) (1) of the Exchange Act of 1934 thereby entitling investors to recission of the investment contracts under Section 29(b) of the Exchange Act?

Failure of a Broker-Dealer to register with the Securities and Exchange Commission can result in staggering civil liability. Presumably, the rationale behind the declaration of voidance of

sales made in interstate commerce by a Broker-Dealer not registered with the Commission appears to lie in the fact that Dealers not so registered are not subject to Commission scrutiny by S.E.C. investors are therefore not protected. The authorities support the view that where sales are made by a Broker-Dealer, not registered with the Commission, are declared void, the purchasers (such as the Petitioners in this action), would be entitled to recission. In other words, each investor in the Shield and Viking Oil and Gas Driling Programs would be entitled to rescind each sale and seek restitution of the initial amounts invested by them. In *Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (C.A. 9th, 1964),* it was held that purchasers of securities, alleging that the sellers had not registered with the Commission as is required under *Section 15(b),* were entitled to maintain a class action seeking recission or damages if recission is not possible.

In *Eastside Church of Christ, et al. v. National Plan, Inc., et al. 391 F. 2d 357 (C.A., Tex. 1968), cert. den. 89 S. Ct. 234, 240, 393 IU.S. 913* that an unregistered broker which purchased bonds issued by several churches from a builder who received those bonds from the churches as an agent was not exempt from registration under the Securities Exchange Act of 1934 and the churches could void the transactions with the broker as being in violation of the Exchange Act without establishing that any harm resulted from the broker's failure to register. The Court opined, after ruling that National Plan was acting as a broker and dealer, as follows:

> "It follows that the purchasers which National made from the appellant churches through their agent Paden were in violation of *Section 15(a) (1)* of the Exchange Act, supra. The question next arises whether appellants may void these transactions because National acted in violation of #15 (a) (1) of the Act. *Section 29 (b) of the Act, 15 U.S.C.A. #78cc(b),* supra, provides that 'every contract made in violation of any provision of chapter or any rule or regulation thereunder **** shall be void **** as regards the

> rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract ****'. There are exceptions to this voiding provision but none is applicable here. *Section 29(b) also contemplates civil suit for relief by way of recission and damages where the transactions are void.* (emphasis supplied), *Cf. Osborne v. Mallory, 86 F. Supp. 869, 879 (S.C.N.Y. 1949); Kardon v. National Gypsum Company, 69 F. Supp. 512, 514 (E.D. Pa., 1946); Geismar v. Bond & Goodwin, 40 F. Supp. 876, 878 (S.D.N.Y., 1941), and see dictum in Goldstein v. Groesbeck 142 F. 2d 422, cert. den. 323 U.S. 737, 65 S. Ct. 36 (2nd Cir., 1944)."*

In Eastside Church of Christ, supra, the Court further ruled that in order for an investor to seek recission, her or she need only show that (a) the prohibited transaction occurred and, (b) the investors were in the class sought to be protected. *Id at pp. 362.* In *Deckert v. Independent Shares Corp. 61 S. Ct. 229, 311 U.S. 282 (1940),* the Supreme Court held that contracts which are void under *Section 29(b), 15 U.S.C.A 78cc (bb)* are subject to recission but investors may seek damages as well. Accordingly, petitioners are entitled to seek recission and damages since Shield, Eigel and Viking failed to register with the S.E.C. as Broker-Dealer prior to offering the investments for sale to the public.

The Court may also look to the Ohio State Revised Code which affords a similar remedy. Under *Section 1707.43, Ohio Revised Code,* the legislature provided as follows:

> "Every sale or contract for sale made in violation of sections 1707.01 to 1707.45, inclusive, of the Revised Code, is voidable at the election of the purchaser ****".

Petitioners do not suggest, however, that *Section 1707.43, supra,* is controlling for the reason that the State of Ohio did issue Dealers Licenses to James C. Eigel each year, beginning in 1965. Those licenses were issued to the Respondent authorizing him to engaged in intra-state sale of similar securities. The con-

trolling import of the section lies in the Respondent's classification as a "Dealer" and the remedy of recission afforded to defrauded purchasers of securities.

FAILURE TO DISCLOSE CAPACITY AS A BROKER-DEALER IS A MATERIAL OMISSION WHICH SATISFIES RULE 10b-5 CLAIMS.

The purpose of *Section 15 (a) (1)* of the *Exchange Act of 1934*, is to regulate the sale of securities by those persons, be they brokers or dealers, by providing certain disciplines such as requiring that those persons so engaged have the proper training, experience and keep proper records. The provision and its requirement is mandatory and is of utmost importance. *Eastside Church of Christ v. National Plan, Inc., supra.* Once registered, the Securities and Exchange Commission may identify those persons engaged in interstate sales of securities and impose reasonably rigid requirements as to testing, training, and other qualifications. *Re Ben Zenoff Co., Securities Exchange Act of 1934, Release No. 9416,, (Dec. 13, 1971), CCH. Red. Secur. L. Rep. #78468.* The Respondents business in the sale of securities in the case at Bar was subject to those regulations. Yet they failed to register each year even though Shield, for example, knew that it had become subject to an S.E.C. Investigation as to a number of other matters. *(Exhibit #306) (S.E.C. File).*

A failure to Register with the Commission as Broker-Dealer when so required and failure to disclose that fact to investors is a material omission for which damages may be claimed under *Section 10b, supra,* and *Rule 10b-5, supra.* The leading case in point is *Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S. Ct. 1456, reh. den. 407 U.S. 916, 92 S. Ct. 2478.* In *Affiliated Ute Citizens, supra,* 85 plaintiffs sought damages for alleged violations by the defendants, in connection with sales by the Plaintiffs of their UDC shares, of *10(b)* of the Securities Exchange Act of 1934, and of *Rule 10b-5.* The Broker-Dealer failed to inform the sellers of shares whether it was acting as broker-dealer. The Supreme Court held that there was a primary duty in part of the Broker to disclose that fact was a

material omission inasmuch as a reasonable investor might have considered the fact important in the making of his or her decision. Accordingly, proof of reliance was not necessary and the requisite element of causation in fact was in fact was therefore established. Followed in *Swanson v. American Consumers Industries, Inc., 475 F. 2d 516 (C.A. 7, Ill. 1953), later appl. 517 F. 2d 555; Roches Bros. Inc. v. Rhoades, 491 F.2d 402 (C.A. 3rd, 1973); Chelsea Associates v. Rapanos, 376 F. Supp. 929 (D.C. Mich. 1974).*

In the case at Bar, Shied and Viking never disclosed to prospective investors whether they were acting as Broker-or-Dealer. Shield never disclosed to investors that they would make a profit eventhough in the Schedule D, Shield stated that it would not make a profit. That failure to disclose to investors whether Shield was acting as a Broker or Dealer was a material omission for which Petitioners are entitled to 10b-5 relief. As to all members of the class, the Court may conclude that there was constructive reliance for had the Petitioners knew that there were substantial over burdens on their investments coupled with the fact that had they known that Shield or Eigel or Viking were acting as Brokers or Dealers, their decision to invest or not to invest might have been different. That failure constituted a device, scheme or artifice to defraud investors. *Rule 10b-5, supra.*

CONCLUSION

In view of the foregoing points and authorities, the conclusion is inescapable that this Petition presents a case in which the United States Court of Appeals for the Sixth Circuit has decided important questions of federal law which conflicts with decisions by other Circuit Courts. The overall judicial benefit which would result in this Court's intervention and exercise of supervisory powers would, inure to the benefit of a wide segment of the investing public.

Respectfully Submitted

/s/

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